

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

original
of sent on
back

74-2275

To be argued by
LOUIS G. CORSI

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2275

UNITED STATES OF AMERICA, ex rel.
JEFFREY FOSTER,
Petitioner-Appellant,

—v.—

JAMES R. SCHLESINGER, Secretary of Defense, JOHN
W. WARNER, Secretary of the Navy, and ADMIRAL
JOHN N. SHAFFER, Commandant, Third Naval Dis-
trict, New York,

Respondents Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLEES

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for Respondents-Appellees.

LOUIS G. CORSI,
GERALD A. ROSENBERG,
Assistant United States Attorneys,
Of Counsel.

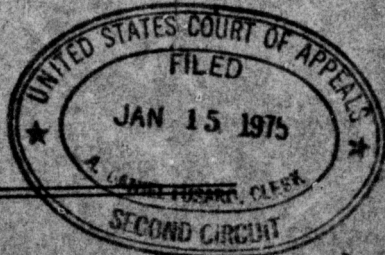


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Questions Presented	1
Statement of Facts	2
A. Background	2
B. Lt. Foster's Request for Discharge as a Conscientious Objector	4
C. Judicial Proceedings	8
D. The Regulatory Criteria for Discharge as a Conscientious Objector	8
ARGUMENT—Summary of Argument	10
POINT I—The Record Clearly Demonstrates a Basis in Fact for the CNP's Conclusion that Lt. Foster's Objection to War had Crystallized Prior to Enrolling in the Ensign 1915 Program	11
A. The Record	11
B. Lt. Foster is Not Entitled to Discharge	17
C. The District Court Correctly Applied Controlling Case Law	21
POINT II—The Failure of Lt. Foster's Commanding Officer to Make a Recommendation is Harmless Error	24
POINT III—Lt. Foster's Argument that He Did Not Qualify As a Conscientious Objector in 1966 is Patently Frivolous	26
CONCLUSION	31

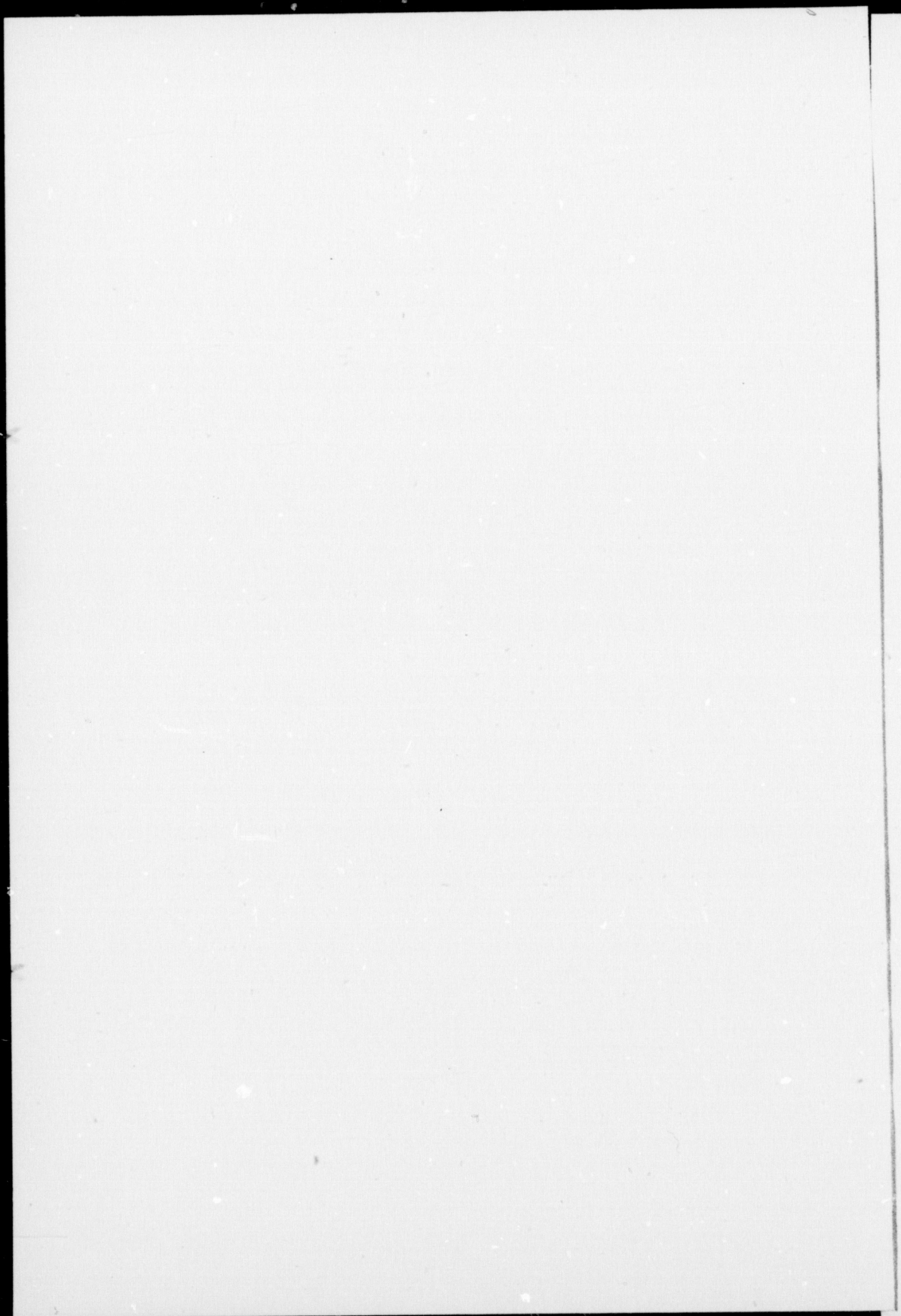
TABLE OF CITATIONS

	PAGE
<i>Ames v. Laird</i> , 450 F.2d 314 (9th Cir. 1971)	22
<i>Aron v. Laird</i> , 358 F. Supp. 1170 (E.D.N.C. 1973), aff'd without opinion, 487 F.2d 1397 (4th Cir. 1973)	18, 20
<i>Bolen v. Laird</i> , 443 F.2d 457 (2d Cir. 1971)	22
<i>Chamoy v. Schlesinger</i> , 371 F. Supp. 685 (D. Hawaii 1974)	18, 19
<i>Ehlert v. United States</i> , 402 U.S. 99 (1971)	18
<i>Friedberg v. Resor</i> , 453 F.2d 935 (2d Cir. 1971)	24, 25
<i>Gee v. United States</i> , 452 F.2d 849 (5th Cir. 1972)	29
<i>Goodwin v. Laird</i> , 317 F. Supp. 863 (N.D. Cal. 1970)	18
<i>Grubb v. Birdsong</i> , 452 F.2d 516 (6th Cir. 1971)	18
<i>McGehee v. McKaney</i> , 312 F. Supp. 1372 (D. Md. 1969)	18
<i>Nurnberg v. Froehlke</i> , 489 F.2d 843 (2d Cir. 1973)	18, 22, 23, 24
<i>Schick v. Reed</i> , 43 U.S.L.W. 4083 (United States, De- cember 23, 1974)	30
<i>United States v. Corliss</i> , 280 F.2d 808 (2d Cir.), cert. denied, 364 U.S. 84 (1960)	22
<i>United States ex rel. Checkman v. Laird</i> , 469 F.2d 773 (2d Cir. 1972)	21
<i>United States ex rel. Donham v. Resor</i> , 436 F.2d 751 (2d Cir. 1971)	18, 23, 24, 25
<i>United States v. Fagnoli</i> , 458 F.2d 1237 (1st Cir. 1973)	28, 30
<i>United States v. Gearey</i> , 368 F.2d 144 (2d Cir. 1966)	18

	PAGE
<i>United State v. Gerin</i> , 464 F.2d 492 (9th Cir. 1972)....	30
<i>United States v. Hoffman</i> , 488 F.2d 923 (5th Cir. 1973)	28, 29
<i>United States v. Sandoval</i> , 475 F.2d 266 (10th Cir. 1973)	29
<i>United States v. Seeger</i> , 340 U.S. 163 (1965)..	26, 28, 29, 30
<i>Welsh v. United States</i> , 398 U.S. 333 (1970)	26, 28
<i>Witmer v. United States</i> , 348 U.S. 375 (1955)	22

STATUTES CITED

Universal Military Training and Service Act, 50 U.S.C. App. § 456	2, 9
32 C.F.R. Part 58.1 (1973)	3
32 C.F.R. Part 75 (1973)	9
32 C.F.R. Part 730.18 (1973)	5, 6, 7, 9, 24, 26, 27



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2275

UNITED STATES OF AMERICA, ex rel. JEFFREY FOSTER,
Petitioner-Appellant,

—v.—

JAMES R. SCHLESINGER, Secretary of Defense, JOHN W.
WARNER, Secretary of the Navy, and ADMIRAL JOHN N.
SHAFFER, Commandant, Third Naval District, New York,
Respondents-Appellees.

BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

This is an appeal from the Order dated September 13, 1974 of the United States District Court for the Southern District of New York (Duffy, *J.*) dismissing the petition for a writ of habeas corpus brought on behalf of appellant, Lt. Jeffrey R. Foster, USNR in which Lt. Foster asserted that he was entitled to a discharge from the United States Naval Reserve as a conscientious objector.

Questions Presented

1. Was the District Court correct in holding that there was a "basis in fact" for the decision of the Chief of Naval Personnel that Lt. Foster was not entitled to a discharge because his conscientious objection to war had crystallized prior to his enrollment in the Ensign 1915 Program?

2. Did the failure of Lt. Foster's commanding officer to submit a report and make a recommendation regarding Lt. Foster's application for a discharge result in prejudice to Lt. Foster, thereby requiring this case to be remanded to the Navy?

3. Was Lt. Foster entitled to a discharge as a conscientious objector because he was allegedly not qualified for such status at the time of his enrollment in the Ensign 1915 Program?

Statement of Facts

A. Background

Jeffrey Foster is a psychiatrist, approximately thirty-two years old, and a commissioned officer in the United States Naval Reserve (the "Navy") presently holding the rank of Lieutenant. On or about February 4, 1966 pursuant to the provisions of the Ensign 1915 Program Lt. Foster executed a deferment agreement with the Navy whereby he was deferred from induction for service under any provision of the Universal Military Training and Service Act or any presidential regulation issued thereunder until after the completion or termination of his course of instruction leading to a degree in medicine and a one-year internship. In exchange for this deferment from active service, Lt. Foster agreed to accept an appointment as an ensign in the Medical Corp, Naval Reserve, and serve 24 months on active duty if called by the Secretary of the Navy. (R. 11.)* Subsequently, in September 1966, Lt. Foster began his inactive duty in the Naval Reserve.

By application dated February 2, 1971, Lt. Foster requested an additional deferment from active duty while

* Hereinafter, "R" refers to the docketed Record on Appeal, and "a" refers to the Joint Appendix.

he completed his residency. (97a.)* Since the Ensign 1915 Program provides a deferment during medical school and a one-year internship only, Lt. Foster was required to enroll in the Berry Plan, another voluntary program offering doctors an additional deferment from active duty in order to complete their residency. (See 32 C.F.R. Part 58.1 through 58.3.)** In his application, Lt. Foster stated that he had been accepted in a residency program for the period July 1, 1971 through July 30, 1974. (97a.) The Navy approved his application and permitted Lt. Foster to defer his active duty commitment during residency.

Notwithstanding Lt. Foster's statement that prior to August 1973, he had never been requested to file any deferment form with the Navy (36a; Brief for Petitioner-Appellant,*** p. 8), Lt. Foster received and returned to the Navy an "ANNUAL QUALIFICATIONS QUESTIONNAIRE, INACTIVE DUTY RESERVE OFFICER" for each of the years (except 1973) that he was enrolled in the Ensign 1915 Program and the Berry Plan. (98a-99a, 101a, 103a-105a.)**** Each of these annual questionnaires should have, at a minimum, reminded Lt. Foster of his ultimate military obligations. In these questionnaires, Lt. Foster provided the Navy with information concerning the current status of his medical training program. The Navy used this information to determine his continued eligibility for a deferment.

* A preliminary application, dated September 1970, was also filed by Lt. Foster in regard to a deferment during residency. This application is not part of Lt. Foster's service record, and therefore, is not part of the Record herein.

** The Berry Plan is not a "successor program" to the Ensign 1915 Program as suggested by appellant. (Appellant's Brief, p. 4.)

*** Hereinafter, "Appellant's Brief."

**** Lt. Foster's statement is further contradicted by the fact that, as indicated above, in order to secure a deferment during residency he had to join a new program and file an additional form entitled "REQUEST FOR DELAY FOR RESIDENCY TRAINING" which he did in February 1971 (97a.)

In addition to these regular communications with the Navy, Lt. Foster responded to another request for information from the Navy shortly before he completed medical school, stating that he did not desire an internship in the Navy and requesting that, should he ultimately be called to active duty, he be given an assignment to a land-based hospital in England, Europe or the United States. (102a.) Subsequently on January 22, 1971, in a handwritten note, Lt. Foster informed the Navy that he was presently enrolled in an internship program that would continue through July 1971. (100a.)

During the time that Lt. Foster was deferred, he was given, and accepted, several promotions in rank. (Appellant's Brief, p. 3). Indeed, Lt. Foster's service record * indicates that after receiving and accepting his appointment as an ensign in September 1966, he was offered a temporary appointment as a lieutenant (junior grade) which he accepted on or about November 1968. Subsequently, after an extension of this temporary appointment, he was offered a permanent appointment as a lieutenant which he accepted by taking the oath of office and executing the appropriate papers before M. W. Murray, LTJG, USNR, on January 29, 1971.

B. Lt. Foster's Request for Discharge as a Conscientious Objector

By letter dated August 3, 1973, the Navy requested Lt. Foster to promptly complete and forward his "Berry Plan form" if he desired a deferment for the current training year. (23a.) Although not identical, that form is quite similar to, and requests the same type of information as, the "REQUEST FOR DELAY FOR RESIDENCY TRAINING" which Lt. Foster had completed and returned to the Navy in February, 1971. (97a.)

* Which is part of the docketed Record herein.

As expressed by Lt. Foster, this letter coupled with his contemporaneous consultation with a young woman dying of leukemia, precipitated his request for a discharge. (36a-37a.)

By letter dated September 18, 1973, Lt. Foster tendered his resignation from the Navy. (24a-25a.) Subsequently, on or about March 4, 1974, the Navy denied this request (8a), and thereafter, Lt. Foster made formal application for discharge as a conscientious objector. (26a-41a.)

As in his letter of resignation, the substance of Lt. Foster's application for discharge as a conscientious objector was that upon notification of the possibility of immediate active service in August 1973, and his experience in counseling a young patient dying of leukemia, his views as to the abhorrence of war had crystallized and had led him to conclude that his beliefs were incompatible with continued affiliation with the Navy. (36a-37a.) In support of his application, Lt. Foster submitted a detailed statement of his beliefs, and letters of reference from his wife, Rose Marie A. Foster (42a-43a), his psychiatrist, Dr. Joel Markowitz (49a), and several friends. (44a-48a.)

Pursuant to the applicable Navy regulations, 32 C.F.R. Part 730.18(g) and (h), Lt. Foster was thereafter interviewed by a Navy psychiatrist and chaplain. With respect to the interview by the Navy psychiatrist, there is nothing in his report (50a-51a) to support the statement in Appellant's Brief (p. 11) that the Navy psychiatrist "fixed the summer of 1973 at the point of time when Dr. Foster's objections to military service became fixed." Indeed, under the Navy regulations, 32 C.F.R. Part 730.18(h), the examining psychiatrist is directed only to

"submit a written report of psychiatric disorders which would warrant treatment or disposition

through medical channels or such character or personality disorder which would warrant recommendation for appropriate administrative action. Comment concerning the sincerity or credibility of the applicant's claimed convictions may be included in the report."

(See also 32 C.F.R. Part 730.18(n).)

A fair reading of that report indicates that the psychiatrist did not exceed his mandate by drawing any conclusion as to the time of crystallization.

The Navy chaplain also submitted a brief written report of his interview with Lt. Foster. In that report, the chaplain stated that:

"In my opinion Doctor Foster is weakly sincere in his convictions that he can never participate in any act of war.

"It is my further opinion that Doctor Foster's claim of conscientious objection is based upon a rare personal moral code, which even he has great trouble in defining." (52a.)

As required by Navy regulations, 32 C.F.R. Part 730.18 (j), a hearing was held before an investigating officer on May 31, 1974. In addition to Lt. Foster, Dr. Joel Markowitz, Lt. Foster's psychiatrist, appeared and testified.* (58a-92a.) On the basis of this testimony and the material presented in Lt. Foster's application, the investigating officer, Commander J. C. Sweeney, recommended that Lt. Foster be discharged from the Navy by reason of conscientious objection. (93a-94a.) Although concluding that on this record "Lt. Foster sincerely holds ethical belief which re-

* Dr. Markowitz's appearance and testimony was at Lt. Foster's request. (60a.)

quire him to refrain from participation in any war at any time" (94a) nowhere did Commander Sweeney make an explicit determination as to when Lt. Foster's objection to war became fixed and concrete.

The transcript of this hearing, Commander Sweeney's report, as well as all other material developed in the record * were forwarded to the Commander, Third Naval District, Lt. Foster's immediate superior officer. (See 32 C.F.R. Part 730.18(j) (10).) By letter dated June 27, 1974, the Commander forwarded this record, without a recommendation, to the Chief of Naval Personnel ("CNP"). (96a.)

Under Navy regulations, the CNP has final authority for Lt. Foster's application, 32 C.F.R. Part 730.18(a) and (k), and on or about July 11, 1974 the CNP notified Lt. Foster that his application for a discharge as a conscientious objector had been denied. (95a.) Reviewing the complete record in the case, the CNP concluded that:

"[I]t is apparent from the testimony of your Psychiatrist that prior to entry into the Navy you were opposed to war and killing. Your Psychiatrist stated that your non-violent attitudes haven't in any way been modified within the past 14 years. While your concerns and reservations may now be stronger there is nothing to indicate that your present beliefs are in substance and foundation any different than those you held before you accepted your commission. While the Chief of Naval Personnel recognizes your sincere desire for a discharge your application and the attendant correspondence are not considered supportive of your request for discharge as a conscientious objector." (95a.)

* Including a rebuttal by Lt. Foster to the report of the Navy psychiatrist and chaplain who had previously interviewed him. (53a-56a.)

C. Judicial Proceedings

By Order To Show Cause brought before the District Court on July 15, 1974, Lt. Foster petitioned for a preliminary injunction and a writ of habeas corpus alleging that the Navy had unlawfully denied his application for a discharge and that he was threatened with irreparable harm unless his activation (scheduled for 4:00 P.M. on that date) was stayed. At that time, the Navy agreed to the entry of a temporary restraining order until July 25, 1974, at which time a hearing was to be held on Lieutenant Foster's petition. Following oral argument on July 25, 1974, the parties agreed to an extension of the temporary restraining order while the case was *sub judice* before the District Court. (119a.)

By an Opinion and Order dated September 13, 1974, United States District Judge Kevin T. Duffy dismissed Lt. Foster's petition for a writ of habeas corpus, holding that there was a "basis in fact" for CNP's conclusion that Lt. Foster's objection to all war had crystallized prior to his enrollment in the Ensign 1915 Program in 1966. In so holding, the District Court ruled that the motion for a preliminary injunction was moot. (123a.)

Lt. Foster immediately filed a notice of appeal (124a), and a motion for a stay; the Navy not having opposed the motion, the District Court granted a stay of Lt. Foster's activation pending disposition of this appeal.

D. The Regulatory Criteria for Discharge as a Conscientious Objector

The Navy Regulations setting forth the criteria that must be used in acting upon an application for a discharge from the Navy as a conscientious objector are found at

32 C.F.R. Part 730.18.* Subsection 730.18(a) defines a conscientious objector as a person:

"who by reason of religious training and belief [has] a firm, fixed and sincere objection to participation in war in any form or the bearing of arms."

This subsection further states that "No vested right exists for any member to be discharged . . . even for conscientious objection, before the expiration of his term of service . . ." and that such a discharge "will be effected only with the approval of the Chief of Naval Personnel."

Subsection (b) is the critical substantive provision for purposes of Lt. Foster's application for discharge and provides that:

"After entering naval service, a request for discharge based solely on conscientious objection which existed but was not claimed prior to induction or enlistment shall not be considered if such beliefs satisfied the requirements for classification as a conscientious objector pursuant to section 6(j) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456) . . . and the member failed to request classification as a conscientious objector by the Selective Service System (SSS) . . . Claims growing out of the experiences prior to entering military service but which did not become fixed until after entry into the service will be considered."

Thus, under this provision, if Lt. Foster's objections to war were fixed and concrete before he joined the Ensign 1915 Program, he is not entitled to a discharge as a conscientious objector.

* These regulations are derived from, and in conformity with, regulations promulgated by the Department of Defense (32 C.F.R. Part 75.)

ARGUMENT

Summary of Argument

The record below clearly demonstrated that Lt. Foster's objection to war was concrete and fixed well before he joined the Ensign 1915 Program in September 1966 and the Berry Plan in February 1971. Doctor Markowitz, the psychiatrist who has counseled Lt. Foster for the last 14 years, testified that Lt. Foster felt a deep and mature abhorrence of war and violence long before September 1966. Indeed, this was substantiated by Lt. Foster's own testimony and the statements contained in his application. Given this evidence, as well as all the other material developed in the record before the CNP, the Navy's denial of Lt. Foster's application for discharge had a "basis in fact". Under the applicable standard of judicial review, the District Court's ruling upholding the decision of the CNP was proper and should be affirmed by this Court.

In addition, neither of Lt. Foster's newly raised procedural arguments justifies reversal of the District Court and the issuance of a writ of habeas corpus or a preliminary injunction. As to the failure of Lt. Foster's commanding officer to make a recommendation, Lt. Foster can show no prejudice, and his application for discharge was afforded reasonable, common sense fairness. Moreover, Lt. Foster's claim that he could not have qualified as a conscientious objector at the time he enrolled in the Navy is patently frivolous.

POINT I

The Record Clearly Demonstrates a Basis in Fact for the CNP's Conclusion that Lt. Foster's Objection to War had Crystallized Prior to Enrolling in the Ensign 1915 Program.

A. The Record

Contrary to Lt. Foster's argument that there is no evidence to support the CNP's conclusion of early crystallization, the record conclusively establishes that Lt. Foster's objection to war had become fixed and concrete prior to his enrollment in the Ensign 1915 Program.

As noted by the CNP in denying Lt. Foster's application, the testimony and written statement of Dr. Joel Markowitz, Lt. Foster's psychiatrist, provide overwhelming support for this conclusion. In his letter dated April 27, 1974, submitted in support of Lt. Foster's application, Dr. Markowitz stated that:

"From the time I first knew him [14 years ago], he abhorred violence and aggression. He has always demonstrated a blanket negative response to war, crime and other destructive activities." (49a.)

Dr. Markowitz elaborated on this statement when he appeared at the hearing before Commander J. C. Sweeney, held on May 31, 1974. He testified that Lt. Foster's longstanding abhorrence of violence was in reaction to his childhood experiences with an extremely aggressive and violent father. (62a-63a.) As noted by Dr. Markowitz, Lt. Foster's way of dealing with the situation presented by his father—a way which Dr. Markowitz believes "the great majority of conscientious objectors take"—was by

"[dividing] reality into two categories: one, a violent, evil category, which is, of course, his father's,

and the other a non-violent, good category, to which he decided to dedicate his life—which is the reason also for his medical school, his psychiatry. (63a.)

In describing the terms in which Lt. Foster expressed his views on war and violence, Dr. Markowitz noted that when he first began treating Lt. Foster in approximately 1960, he expressed his opposition to warfare in simple moral and ethical terms. (64a.) Dr. Markowitz's testimony further indicates that these basic moral and ethical beliefs did not change, although their expression became more intellectualized. (65a.)

The longstanding and fixed character of Lt. Foster's objection to war and violence is demonstrated by Dr. Markowitz's further testimony that:

"It is part of an indication of the strength of Dr. Foster's beliefs that in 14 years of psychotherapy [my own willingness to enlist in World War II and see my son serve in Vietnam, as well as my belief in a military strong America'] hasn't in any way rubbed off on him. *He hasn't in any way modified his non-violent attitudes.*" (68a.) (Emphasis supplied.)

In Dr. Markowitz's view, Lt. Foster's objection to war found explicit and concrete expression in his early opposition to the Vietnam War. At the hearing, counsel for Lt. Foster asked Dr. Markowitz:

"Q. Do you recall approximately when this expression of horror with respect to the Vietnamese War took place? Was it in 1965, when the war—I think that was when the war began to escalate—or was it more recently, was there something in particular which occurred which you can remember . . . and if you can't remember you don't, of course, but if there was, can you point it out?" (75a.)

Dr. Markowitz responded:

"A. I can't, really. I remember that throughout his sessions *from the beginning of the war, from the time it began to appear in newspapers*, Dr. Foster has always pushed from his mind most violent, aggressive things. *I don't think he could push this from his mind. It was to him too terrible an event.* "I can't think of anything in particular that has changed his emphasis, no." (75a.) (Emphasis added.)

Perhaps, the following testimony of Dr. Markowitz most clearly establishes that Lt. Foster's objection to war had crystallized prior to his enrollment in the Navy:

"[W]hen he first heard that he had to go into the Navy he used a device which is familiar to psychiatrists called denial. I remember he came to my office at that time and simply mentioned to me that there was no problem, he was supposed to go into the Navy but there was some alternative and I don't think he ever considered himself in the Navy from this time on and I never heard of it from that time on until this very time. He just pushed it out of his mind." (63a-64a.) (Emphasis added.)*

This testimony demonstrates beyond a doubt that Lt. Foster's views had already progressed beyond a "generalized" abhorrence of war, and indeed, that he had focused on the incompatibility of his longstanding and concrete objection to war and affiliation with the Navy**.

* It is clear that Dr. Markowitz is talking about the period of time in 1966 when Lieutenant Foster first joined the Ensign 1915 Program, rather than when he was notified of the possibility of active duty in August 1973. (See 71a-72a.)

** Appellant's speculation that Lt. Foster's apparent "denial" delayed crystallization until 1973 is unpersuasive. (Appellant's Brief, pp. 12 and 46.) By Dr. Markowitz's testimony, Lt. Foster

[Footnote continued on following page]

Nonetheless, instead of following the prescribed procedure of making his objection known to the Selective Service and seeking classification as a conscientious objector from his local draft board in 1966, Lt. Foster eliminated all risk of being drafted by enrolling in the Ensign 1915 Program, submitting his "annual qualifications questionnaires" on six occasions, accepting promotions and then making a new application for continued deferment under the Berry Plan in 1971. As that shelter period was drawing to a close more than seven years later in 1973, Lt. Foster finally chose to notify the Navy of his problems of conscience.

In addition, Lt. Foster's own testimony and statements in his application fully support the view that his objection to war had crystallized prior to joining the Ensign 1915 Program. In his application for discharge as a conscientious objector, Lt. Foster described his beliefs in great detail:

"I believe that among such living systems—of which man is the only representative known—there is an ethical code which derives from this awareness of the remarkable biologic uniqueness we have been endowed with. * * * Certainly the inherent violence and destruction of war between men is the most extreme violation of this basic moral directive and must always be opposed!" (28a-29a).

Lt. Foster further stated in his application that the origins of these beliefs "can be traced to the year prior to my entry into medical school. I was at that time completing my pre-medical and some advanced theoretical biology courses at Columbia University." (31a.) The

already recognized that "go[ing] in the Navy" was unacceptable to him, but "there was no problem" because there was "some alternative." (63a.) Lt. Foster has offered no explanation for this testimony of Dr. Markowitz.

nature of his curriculum was an investigation of new theoretical approaches to understanding the nature of living systems and the original focus was man and his decision-making process. As Lt. Foster has stated, he was "keenly aware of our rapidly escalating Vietnam War involvement" and was "very upset by it." The war and its troubling effect upon him "is undoubtedly why the original question so absorbed me." The net result of this was that Lt. Foster invested "many hundreds of hours of concentrated study and wrote over 400 pages of increasingly detailed theory," justifying on biological grounds a philosophic objection to violence and warfare. (31a.)

At the hearing before Commander Sweeney, Lt. Foster further testified concerning the development of his beliefs. In response to questioning by Commander Sweeney concerning why his belief in the uniqueness of man led him to reject violence, Lt. Foster cited a lecture delivered in 1966 by George Wald, a Harvard University professor of biology, whose anti-war beliefs corresponded with and reinforced positions then held by Lt. Foster. (83a.)

The record thus fully supported the conclusion of the CNP that Lt. Foster's objection to war had crystallized and was fixed prior to his enrollment in the Ensign 1915 Program. By his own testimony, the time before entering medical school was one of deep intellectual and philosophic inquiry. It was undoubtedly also a time of personal reflection and crisis for Lt. Foster, who had already been in therapy for about six years as a result of his early childhood experiences with an excessively violent father, and who was deeply troubled by the rapidly escalating war in Vietnam. Indeed, Lt. Foster appears to have realized in 1966 that his views were incompatible with any involvement with the military, but he chose to disregard these

feelings and beliefs and enrolled in the Ensign 1915 Program, and later the Berry Plan, and accepted their benefits.*

Moreover, when read in their full context, the excerpts from Dr. Markowitz's testimony quoted in the section of Appellant's Brief entitled "*Conclusive Evidence of Late Crystallization*" (pp. 14-16) provide further support for the opposite conclusion that Lt. Foster's views had crystallized *prior* to joining the Ensign 1915 Program. When asked by counsel for Lt. Foster whether he had "noticed anything in the recent period, which I will refer to as the last year, which had made it impossible for [Lt. Foster] to serve in the armed forces," Dr. Markowitz candidly responded:

"... I have the feeling he *never* could have served in the armed forces at the time. I have the feeling that any time he would have been presented with this situation something like this would have happened. So I can't..." (75a-76a.) (Emphasis added.)

Without permitting Dr. Markowitz to finish his response to that question, counsel for Lt. Foster then posed the leading questions quoted at page 16 of Appellant's Brief.

Dr. Markowitz's expressed belief that Lt. Foster "could never have served in the armed forces" is consistent with his recollection that, when first faced with going into the Navy, Lt. Foster told him that "there was some alternative." (63a.) Indeed, it is consistent with Dr. Markowitz' surprise in 1973 when counsel for Lt. Foster informed him that Lt. Foster had been an officer in the

* Neither in his detailed application for discharge as a conscientious objector nor in his testimony at the subsequent administrative hearing, did Lt. Foster even attempt to describe the beliefs or thoughts which animated his decision initially to join the Ensign 1915 Program or the Berry Plan. Rather than indicate how he perceived these commitments in the context of his alleged "generalized abhorrence of war", Lt. Foster has ignored this issue throughout these proceedings, and has merely stated that his views did not crystallize until the late summer of 1973.

Navy since 1966. Certainly, it dispels any notion that Dr. Markowitz' testimony offers "no basis in fact", for the CNP's decision. (Appellant's Brief, p. 42.)

It is submitted that the clear and only inference to be drawn from all of this testimony is that Lt. Foster's objection to war and participation in the armed forces had crystallized before he enrolled in the Ensign 1915 Program, and later, the Berry Plan.*

B. Lt. Foster is Not Entitled to Discharge

In upholding the Army's denial of a discharge to a conscientious objector who had failed to comply with a comparable Army regulation, this Court recently stated that:

"There is no 'national policy' that we know of which permits the true conscientious objector to hide his beliefs in order to obtain the advantages of a commission, and then when called to serve, suddenly advert to his conscience. The obligation of the conscientious objector is to give timely notice of his reservations and this is provided for in the regula-

* Contrary to appellant's assertion, Appellant's Brief, p. 42, the reference letters submitted by Lt. Foster in his application can hardly be cited as evidence to the contrary. The letters of Kenneth and Susan Gordon indicate that they have known Lt. Foster only since 1972 (44a-47a); likewise, the letter of Dr. Paul Spring (48a) indicates that he had known Lt. Foster only since 1970. None of these individuals, and therefore none of their letters, can provide any insight into what his views were at the time he joined the Ensign 1915 Program. Even the letter from Lt. Foster's wife, which should have furnished the most unequivocal support for the late crystallization theory, is, at best, inconclusive on this issue. (42a-43a.)

tions. . . . [Citing cases.]" *Nurnberg v. Froehlke*, 489 F.2d at 847.*

Precisely the same situation is presented herein. As demonstrated above, Lt. Foster's objection to war had crystallized prior to joining the Navy in 1966, and although he recognized the fundamental incompatibility between his objection and affiliation with the Navy at that time, he did not advert to his conscience until more than seven years later in 1973. Under the applicable Navy regulation, Lt. Foster's application was, therefore, properly denied by the CNP.**

In arguing to the contrary that he is entitled to a discharge under these regulations because his views had not crystallized prior to entry, Lt. Foster has sought support primarily in substantially dissimilar cases: *Chamoy v. Schlesinger*, 371 F. Supp. 685 (D. Hawaii 1974); *Aron v. Laird*, 358 F. Supp. 1170 (E.D.N.C. 1973), *aff'd without opinion*, 487 F.2d 1397 (4th Cir. 1973); *Goodwin v. Laird*, 317 F. Supp. 863 (N.D. Cal. 1970); and *McGehee v. McKaney*, 312 F. Supp. 1372 (D. Md. 1970). Indeed, as the District Court noted in its opinion below (120a-121a), un-

* See *Ehlert v. United States*, 402 U.S. 99, 102 n. 4 (1971), where the Supreme Court noted that "[t]he power of the Selective Service to set reasonable time limits for presentation of claims, with the penalty of forfeiture for noncompliance, seems never to have been questioned by any court. See, e.g. *United States v. Gearey*, 368 F.2d 144, 149 and n. 9 (CA 2)." (Emphasis added.)

** Appellant's suggestion that the Courts have upheld the military's denial of a discharge only in those cases where the applicant was not a sincere conscientious objector can not withstand scrutiny. E.g., *Nurnberg v. Froehlke*, 489 F.2d 843 (2d Cir. 1973); *Grubb v. Birdsong*, 452 F.2d 516 (6th Cir. 1971); see also *United States ex rel. Donham v. Resor*, 436 F.2d 751 (2d Cir. 1971).

like the records in the *Goodwin* and *McGehee* cases, the record herein "suffers from no . . . deficiency" as to the time of crystallization.

For instance, in *Chamoy v. Schlesinger, supra*, the military denied the petitioner's request for a discharge on the stated ground that

"your actions are inconsistent with your alleged beliefs, and cast considerable doubt on the depth and sincerity of your claim of conscientious objection."
371 F. Supp. at 686 n. 3.

Since the Navy has never relied upon lack of sincerity in Lt. Foster's objection to war as a reason for denying his application, *Chamoy* is irrelevant.

Moreover, as to the question of crystallization, which was only peripherally raised in *Chamoy*, the Court noted that the military was apparently arguing that petitioner's failure to demonstrate a "post-enlistment crystallization" supported its decision to deny the application. 371 F. Supp. at 686 and 688. As formulated, neither the parties nor the Court squarely faced the question whether there was evidence to support *pre-enlistment* crystallization. Indeed, unlike the situation here, the only evidence cited by the Court relevant to the question of pre-enlistment crystallization was the written statement by the petitioner in which he specifically denied pre-enlistment crystallization. 371 F. Supp. at 688 n. 4.

The facts herein are quite to the contrary. Nowhere in his rather lengthy and detailed statements in support of his application, or in his testimony at the hearing, did Lt. Foster specifically deny that his views had crystallized prior to joining the Ensign 1915 Program or explain the commitment made in 1966 in the context of his concededly long-held views.

Likewise, the decision in *Aron v. Laird*, 358 F. Supp. 1170, is inapplicable for the same reasons. In *Aron*, a case relied upon in *Chamoy*, the District Court expressly noted that "... the only issue is whether there was a basis in fact for the finding that the Petitioner was *not sincere* in his opposition to war. . . ." 358 F. Supp. at 1173. (Emphasis added.) Although there is some general discussion of crystallization in that opinion, the Court was never required to, and in fact never did, focus on the date of the petitioner's crystallization. The Court there reviewed the administrative record and concluded only that "[a]ll of the tangible evidence in the record points to Dr. Aron's sincerity." 358 F. Supp. at 1174.*

Goodwin and *McGehee*, while superficially similar to this case, are equally inapposite. As the District Court noted, Lt. Foster's beliefs at the time he joined the Navy "would seem to have progressed to a far more developed state than those of the petitioners in *Goodwin* or *McGehee*." (122a-123a.)

The record in neither of those cases details the depth and consistency of the views held by those petitioners as the record herein does with regard to Lt. Foster's objection. At the time Lt. Foster enrolled in the Navy, he was approximately 25, had already finished college and was heavily engaged in serious and extensive writing, reflection and research on the uniqueness and origins of man. The intensity of that inquiry and reflection was no doubt heightened by

* It should also be noted, however, that in that record, as in *Chamoy*, there was at least some attempt in the form of a statement by the petitioner to explain the apparent inconsistency between the act of joining the military and "always" holding views opposed to war and violence. 358 F. Supp. at 1175. No such minimal explanation has been offered here.

the fact that Lt. Foster was deeply disturbed by the Vietnam War and had already been in psychotherapy for approximately six years. Indeed, perhaps the most telling evidence of early crystallization—which clearly distinguishes this case from both *Goodwin* and *McGehee*—is the view expressed by Dr. Markowitz that Lt. Foster could *never* have served in the armed forces. (76a.) The record evidence of early crystallization in *Goodwin* and *McGehee* pales in comparison.*

C. The District Court Correctly Applied Controlling Case Law

Appellant's amorphous attack on the District Court opinion is unconvincing. The charge that the District Court did not correctly apply the standard of review in this case, (Appellant's Brief, pp. 49-51), is clearly unfounded. In noting that the test here is whether there is a "basis in fact" for the CNP's decision that Lt. Foster's objection to war had crystallized prior to joining the Navy, the District Court, citing *United States ex rel. Checkman v. Laird*, 469 F.2d 773 (2d Cir. 1972), specifically acknowledged that this test required that there be an 'objective basis' in the record. (120a.) Appellant's argument, Appellant's Brief, p. 50, that the District Court erroneously applied a "vague 'some evidence'" test, is a semantic quibble.

As demonstrated above, a fair reading of the record herein clearly supports the District Court's judgment that there is an *objective* basis underlying the CNP's decision of early crystallization. Indeed, in light of the testimony of Dr. Markowitz concerning Lt. Foster's longstanding and

* This same analysis clearly holds true for the other "crystallization" cases cited by appellant. Indeed, the Navy has not asserted herein that prior general beliefs and views as to war and violence are grounds to deny a conscientious objection application. Certainly, the specific and clear evidence presented herein cannot fairly be characterized as a reflection of merely "general" views.

deep abhorrence of war and violence, the profoundly troubling effect on him of the escalating war in Vietnam, and Dr. Markowitz's belief that Lt. Foster could never have served, appellant lacks *any* basis in fact for his assertion that the record herein demonstrates only that Lt. Foster had a "dislike of war and violence" when he joined the Ensign 1915 Program. (Appellant's Brief, p. 43.)*

Appellant's further objection that the District Court erred by relying on *Nurnberg v. Froehlke*, 489 F.2d 843, is incomprehensible. On strikingly similar facts, this Court vacated the District Court's issuance of a writ of habeas corpus, which would have discharged a Berry Plan doctor from service in the Army, and reiterated the well-established standard of judicial review in these cases:

"[W]hether on this record there is a basis in fact for disbelieving petitioner's claim that his conscientious objector beliefs became fixed only when faced with the call to active service.' . . . This is admittedly a narrow test. *Ames v. Laird*, 450 F.2d 314, 315 (9th Cir. 1971) (*per curiam*); *United States v. Corliss*, 280 F.2d 808, 810 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960)." *Nurnberg v. Froehlke*, 489 F.2d at 846.

Further, the Court cautioned that:

"A court is not to substitute its judgment on the weight of the evidence for that of the designated agency. *Witmer v. United States*, 348 U.S. 375, 380-81 (1955). If there is objective evidence, even

* The detail of the record herein on the question of early crystallization clearly distinguishes *Bolen v. Laird*, 443 F.2d 457, 460 (2d Cir. 1971) wherein this Court required further proceedings before the Navy because "In a careful examination of the record that was before the review board, this Court is unable to find *any evidence, one way or the other*, with respect to crystallization." (Emphasis added.)

though not preponderant or substantial, the finding must be sustained. *United States ex rel. Donham v. Resor*, 436 F.2d 751, 753 (2d Cir. 1971)." *Nurnberg v. Froehlke*, 489 F.2d at 846-47.

In concluding that the Army's determination rejecting Nurnberg's application had a "basis in fact," this Court reviewed Nurnberg's statements as well as those of his references.

"While petitioner makes the self-serving statement that his views did not become fixed until he was faced with the prospect of active service, he also expressed the view that when he enlisted, he 'had the unrealistic hope that he might not be called.' This together with the fact that he points to no event or experience (such as combat training or firearms instruction) during his Berry Plan shelter period which triggered a crystallization, strongly suggests that the C.O. status of Nurnberg had blossomed long before enlistment. His childhood memories and religious up-bringing would support an earlier maturation than Nurnberg now claims. We cannot ignore the opinions of those who knew the petitioner best, who have no motive to dissimulate and who sincerely believed that his conscientious objector views were long standing." 489 F.2d at 848.

Notwithstanding appellant's assertion to the contrary, Appellant's Brief, p. 51 n, the evidence of Lt. Foster's "conscientious objection or inability to serve" is as strong as, if not stronger than, the evidence presented in *Nurnberg*. In the face of substantial evidence to support early crystallization, Lt. Foster has offered only a self-serving statement that his views crystallized in the summer of 1973. He has remained completely silent on his decision

to join the Ensign 1915 Program in 1966, or to seek a further deferment under the Berry Plan in 1971.* Lt. Foster's tardy disclosure of his conscientious objection to war, transparently labelled as a newly discovered ethical tenet, rendered his application for a discharge untimely within the meaning of the Navy Regulations. 32 C.F.R. Part 730.18. *See also, Nurnberg v. Froehlke*, 489 F.2d at 847.

POINT II

The Failure of Lt. Foster's Commanding Officer to Make a Recommendation is Harmless Error.

Lt. Foster argues for the first time on appeal that the decision of the CNP should be reversed because his commanding officer failed to scrupulously follow Navy regulations and make a recommendation on his application. This failure, appellant now argues, has denied him "substantial procedural rights." (57a.) It is difficult to discern any basis for this claim. At most, given the fact that Lt. Foster had little if any contact with his commanding officer during the seven years of his shelter period (Appellant's Brief, p. 29), it is unrealistic to expect more than a *pro forma* recommendation of approval or denial by the commanding officer. In such a situation, the absence of the commanding officer's recommendation has been held to be harmless error.

For example, in *Friedberg v. Resor*, 453 F.2d 935 (2d Cir. 1971), this Court suggested that the recommendation of a unit commander in a Berry Plan situation is of minimal if any importance. Citing *United States ex rel. Don-*

* Apparently, Lt. Foster, like Nurnberg, had the "unrealistic hope that he might not be called." (Compare Dr. Markowitz's testimony. (63a-64a.))

ham v. Resor, 436 F.2d 751, 755 (2d Cir. 1971) this Court stated:

“‘The obvious purpose of the regulation requiring a recommendation from the unit commander is to obtain an opinion from someone in close personal contact with the applicant.’ Because of the nature of the Berry Plan [petitioner] had no personal contacts with any unit commander. In the view we take of this case it is unnecessary to consider the weight to be accorded the unit commander’s recommendation under such circumstances.” *Friedberg v. Resor*, 453 F.2d at 936 n. 1.

Even assuming that the unit commander had made a recommendation of approval in this case,* that added factor would hardly support a reversal of the decisions of the CNP and the District Court. Indeed, as affirmed by the District Court, the determination by the CNP that Lt. Foster’s objection to war had crystallized prior to entry in the Navy is amply supported by an objective basis in fact and was arrived at only on the basis of the record herein which was developed after a full and fair opportunity for Lt. Foster to present his case. Lt. Foster cannot, therefore, now be heard to complain that he has been deprived of common sense fairness in this process.

This same analysis dispels any notion that the CNP’s disagreement with the hearing officer’s recommendation has in any way prejudiced Lt. Foster. As noted by the District Court, demeanor evidence in cases involving the question of the time of crystallization is not determinative. (123a.) Moreover, there is “considerably more evidence” upon which the CNP could have based, and obviously did base, its denial

* It should be noted that there is no evidence to support such an assumption here.

of Lt. Foster's application. In this context, the hearing officer's recommendation of discharge is of little significance, if any, and the fact that it was not followed, cannot serve as a basis to overturn the CNP's decision.*

POINT III

Lt. Foster's Argument that He Did Not Qualify As a Conscientious Objector in 1966 is Patently Frivolous.

In a final effort to justify reversal of the decisions of the CNP and the District Court, the appellant, for the first time, raises the entirely new argument that even assuming his beliefs had crystallized prior to enrolling in the Ensign 1915 Program, he would not have qualified for conscientious objector status under the interpretation of the requirements prevailing at that time.

Essentially, appellant argues that *Welsh v. United States*, 398 U.S. 333 (1970), rather than *United States v. Seeger*, 380 U.S. 163 (1965), changed the interpretation of the Selective Service Act so as to recognize conscientious objection based on views that are not avowedly religious in nature. Since Lt. Foster now characterizes his views in 1966 as non-religious, he concludes that he would not, therefore, have qualified for conscientious objector status at that time. This argument is without merit and must fail here for several reasons.

* This is further underscored by the fact that the hearing officer did not make a specific finding as to the time of crystallization. Since Navy regulations provide that the CNP has final authority to approve or deny such an application, 32 C.F.R. Part 730.18(a) and (k), and the decision herein of the CNP is supported by a basis in fact, it would be futile to remand this case to the hearing officer for a specific finding.

Initially, though, it must be noted that appellant's attempt to explain why this argument was not raised below—thereby denying the CNP and the District Court an opportunity to consider it—is clearly insufficient. Lt. Foster, by the substance of his letters and application for discharge, framed the issues presented to the CNP and ultimately the District Court concerning his request for discharge. Nowhere in any of these communications did he ever raise this argument as a ground to support his discharge under 32 C.F.R. Part 730.18(b). His argument that there was “no opportunity or reason” to raise the issue before the CNP (Appellant's Brief, p. 58 n) is simply untenable. Moreover, given the specific decision of the CNP, appellant was on notice and should have raised this argument in the District Court.*

Additionally, appellant's statement at page 58 of his brief that this argument can nonetheless properly be considered by this Court because “no factual development is necessary” is undoubtedly incorrect. At no stage of these proceedings did the inquiry focus on the nature of Lt. Foster's beliefs. Indeed, given the manner in which Lt. Foster formulated his application, there was no need for the Navy to inquire into, or make a decision with respect to this issue. Appellant's out-of-context references to the chaplain's report and the report of the hearing officer provide no support for his conclusion that no further factual development on this issue is necessary. Indeed, appellant grudgingly concedes that there is contrary testimony from Lt. Foster on this point. (Appellant's Brief, p. 59 n.)

* Likewise, it should be noted that Lt. Foster has never offered this reason, or any reason, for his decision to enroll in the Ensign 1915 Program rather than seek conscientious objector status in 1966.

Should this Court, contrary to the weight of authority, accord appellant's legal argument any validity, this case should be remanded to the Navy for further administrative proceedings in order to fully develop the record on this question and give the Navy a full and fair opportunity to consider this issue.

Such a remand is, however, clearly unnecessary. *United States v. Seeger*, 380 U.S. 163 (1965), which was decided prior to the time Lt. Foster enrolled in the Navy, clearly recognized "non-religious" views as a basis for conscientious objection. *Welsh v. United States*, 398 F.2d 333 (1970), was little more than an affirmation or refinement of that basic holding in *Seeger*.

Moreover, the weight of judicial authority, notwithstanding the decision in *United States v. Fagnoli*, 458 F.2d 1237 (1st Cir. 1973) cited by Lt. Foster, holds to this view. For instance, in *United States v. Hoffman*, 488 F.2d 923 (5th Cir. 1974), the defendant was convicted of refusing induction in the Army. On appeal, defendant argued that his draft board erred by failing to act on his request (after *Welsh*) to reopen his classification when, he alleged, he was first alerted that conscientious objection could be based on non-religious beliefs.* In rejecting this argument, the Court stated:

"[Defendant's] position is supported by the First Circuit's holding in *United States v. Fagnoli*, 458 F.2d 1237 (1973), which relied upon changes in Selective Service guidelines. However, this circuit

* Again, it should be noted that Lt. Foster has not given this as a reason for waiting until the autumn of 1973 to claim conscientious objection.

has specifically rejected [defendant's] contention, based upon our analysis that *Welsh* did not constitute a change in the law but merely followed the earlier Supreme Court decision in *United States v. Seeger*, 380 U.S. 163 . . . *Gee v. United States*, 452 F.2d 849 (5th Cir. 1972). Accord *United States v. Gerin*, 464 F.2d 492 (9th Cir. 1972)." *United States v. Hoffman*, 488 F.2d at 928.

Further support for this analysis is found in *United States v. Sandoval*, 475 F.2d 266, 269 (10th Cir. 1973) wherein the Court explained:

"In *Welsh*, the Supreme Court held that a registrant's conscientious objection to war is "religious" within the meaning of the statute if the opposition stems from registrant's moral, ethical or religious grounds about what is right or wrong and these beliefs are held with the strength of traditional religious convictions. We need not here get involved in any extended discussion as to whether *Welsh* represents "new law" on this particular matter. See *United States v. Fagnoli*, 458 F.2d 1237 (1st Cir. 1972). At least four members of the Supreme Court deemed *Welsh* to be controlled by the rule previously announced in *United States v. Seeger*, 380 U.S. 163, And whether *Welsh* be regarded as an extension of *Seeger* or only a clarification thereof, the fact of the matter is that in *Seeger*, which was a case in which the three appellants did not belong to any orthodox religious sect, the Supreme Court held in 1965 that the test to be applied in determining whether a conscientious objection is religious oriented is whether the claimed belief occupies the same place in the life of the objector, even though not belonging to an orthodox religious sect, as an orthodox belief in God holds in the life of one clearly qualified for exemption."

Appellant offers no support for his statement, Appellant's Brief, p. 62, that it was only after *Welsh* that the country recognized ethical and moral beliefs as a basis for conscientious objection. To the contrary, the Court in *United States v. Gerin*, 464 F.2d 492 (9th Cir. 1972) noted that "Local Boards have entertained applications for C.O. status from registrants who claimed their views were not the product of traditional religious training since *United States v. Seeger*, 380 U.S. 165"

Likewise, the bald assertions that if Lt. Foster had made application in 1966, "he would have had his application denied" and that "judicial review would not have afforded him relief", Appellant's Brief, p. 62, are speculative and, as speculation, fairly improbable.*

Clearly, such speculation, based upon an argument that has been rejected time and again, can hardly justify reversing the decisions of both the CNP and the District Court in this case.

* If this court concludes, however, that the question of Lt. Foster's qualification for conscientious objector status in 1966 is properly raised and that *Welsh* enlarged the class of persons exempted from military duty, then it will also have to decide an issue not mentioned by appellant, namely, the retroactivity of *Welsh*. If, as the First Circuit has held, *United States v. Fagnoli*, 458 F.2d 1237 (1st Cir. 1972), those convicted prior to 1970 under *Seeger* standards are entitled to retrial under the allegedly broader standards articulated in *Welsh*, then Lt. Foster should find no solace in the argument that he would have failed the *Seeger* test. Since he admittedly passes the *Welsh* test and since *Welsh* merely restated but did not amend the Selective Service laws, Lt. Foster should be deemed to have been qualified for conscientious objector treatment as of 1966. But see, *Schick v. Reed*, 43 U.S.L.W. 4083, 4088 (Marshall J., dissenting) (United States, December 23, 1974).

CONCLUSION

For all of the foregoing reasons, the decision of the District Court dismissing Lt. Foster's petition for a writ of habeas corpus should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for Respondents-Appellees.*

LOUIS G. CORSI,
GERALD A. ROSENBERG,
*Assistant United States Attorneys,
Of Counsel.*

January, 1975

2 copies Received
Daniel Rieff
Atty for Snell
15 Jan 75

